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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:)	Case No. 15-26465-D-7
)	
Scott Charles Pomeroy,)	Docket Control No. GHJ-1
)	
Debtor.)	Date: June 15, 2016
)	Time: 10:00 a.m.
)	Dept: D
)	

MEMORANDUM DECISION

This is the trustee's amended objection to the debtor's claim of exemption of an asset described by the debtor as an "ERISA Qualified Retirement Account" named the "Pomeroy Retirement Trust" (the "Plan"). The debtor filed opposition and the trustee filed a reply. Having heard oral argument at the initial hearing, the court gave the debtor time to supplement the record and the trustee time to respond, which they have done. For the following reasons, the objection will be overruled.

There are three assets alleged by the debtor to be in the Plan: (1) a vacant lot in Truckee, California; (2) an account at Wells Fargo Bank; and (3) an account at Scottrade. The debtor claims the Plan as exempt under (1) Cal. Code Civ. Proc. § 703.140(b)(10)(E); and (2) § 522(b)(3)(C) and (4) of the Bankruptcy Code.¹ The court concludes the exemption is properly

1. The debtor also claimed the Plan as exempt under § 522(p) of the Bankruptcy Code, but has since conceded that was a mistake. That claim of exemption will be considered to have been
(continued...)

1 claimed under both sections. The court will begin with the
2 former.

3 Code of Civil Procedure § 703.140(b)(10)(E)

4 Under this subsection, a debtor may exempt a payment under a
5 stock bonus, pension, profit-sharing, annuity, or similar plan,
6 (1) to the extent reasonably necessary for the support of the
7 debtor and his or her dependents, (2) unless (a) the plan was
8 established by an insider that employed the debtor at the time
9 the debtor's rights under the plan arose; (b) the payment is on
10 account of age or length of service; and (c) the plan does not
11 qualify as tax-exempt under any of a group of sections of the
12 Internal Revenue Code. The latter three factors are in the
13 conjunctive; that is, if all three are present, the plan is not
14 exempt. If any of the three statements is not true, the plan is
15 exempt (to the extent it meets the reasonably necessary test).
16 The trustee raises arguments on all of these issues. The burden
17 of proof on all these issues is on the debtor. Cal. Code Civ.
18 Proc. § 703.580(b); Diaz v. Kosmala (In re Diaz), 547 B.R. 329,
19 337 (9th Cir. BAP March 11, 2016). A brief discussion of the
20 debtor's standard of proof appears at the end of this ruling.

21 The trustee contends all three of the "unless" factors are
22 present in this case; that is, he contends the Plan was
23 established by an insider - the debtor himself, that the Plan is
24 on account of age, and that the Plan does not qualify as
25 tax-exempt. The debtor concedes the point as to the second
26 factor: the Plan is on account of age. However, at least one of

27 _____
28 1.(...continued)
withdrawn.

1 the other factors is not present here: in its discussion of
2 Bankruptcy Code § 522(b)(3)(C), below, the court concludes the
3 Plan is tax-exempt. As the factors are in the conjunctive, and
4 as at least one is not present in this case, the court need not
5 determine whether the first factor is present - whether the Plan
6 was established by an "insider that employed the debtor."

7 The trustee takes the position that "necessary for the
8 debtor's support" means necessary for his support now (or more
9 precisely, as of the petition date), not when he retires. "In
10 the end, the Debtor's arguments about 'reasonably necessary for
11 support' boil down to speculation that he will need the
12 retirement assets at some point in the future. However, the test
13 is not whether he will someday need the assets for support; the
14 test is whether the assets were necessary for his support when he
15 filed his petition." Trustee's Initial Reply, DN 50 ("Initial
16 Reply"), at 8:6-9. The trustee begins with the well-known
17 proposition that a debtor's exemption rights are determined as of
18 the petition date,² and from that, proceeds to the unqualified
19 statement that "[n]othing in Hamo or any of the similar decisions
20 on the subject has used a debtor's retirement needs as a basis
21 for holding that a debtor has satisfied the 'reasonably necessary
22 for support' test." Initial Reply at 7:13-14. On the contrary,
23 both Hamo and case law from courts within the Ninth Circuit
24 consider whether the debtor will need the retirement assets for
25 his or her support when he or she retires. The trustee has cited

26
27 2. Wolfe v. Jacobson (In re Jacobson), 676 F.3d 1193, 1199
28 (9th Cir. 2012) ["bankruptcy exemptions are fixed at the time of
the bankruptcy petition."]; Cisneros v. Kim (in Re Kim), 257 B.R.
680, 687 (9th Cir. BAP 2000) [same].

1 no case, and the court has found none, where the court limited
2 its consideration to a debtor's need for his retirement assets at
3 present in a situation where the debtor is not yet retired, and
4 from a policy standpoint, it would make no sense whatsoever to do
5 so.

6 The Hamo decision the trustee refers to is Hamo v. Wilson
7 (In re Hamo), 233 B.R. 718 (6th Cir. BAP 1999). In that case,
8 the Sixth Circuit Bankruptcy Appellate Panel listed what it
9 called the factors the courts uniformly consider in making the
10 reasonably necessary determination; the list includes "[t]he
11 debtor's present and anticipated living expenses" and his
12 "present and anticipated income from all sources." 233 B.R. at
13 723 (emphasis added). The panel found not clearly erroneous the
14 bankruptcy court's finding that a portion of the debtor's IRA was
15 "reasonably necessary to sustain his basic needs in the future."
16 Id. at 724 (emphasis added). As to the remaining portion of the
17 IRA, the panel considered that "no evidence was presented to
18 indicate that the Debtor's future living expenses would
19 substantially increase or that his wife would become unable to
20 continue to pay his expenses." Id. All of these are forward-
21 looking considerations that would not have been relevant under
22 the trustee's theory in the present case.

23 The Bankruptcy Appellate Panel in this circuit enunciated a
24 similar list of factors in In re Moffat, 119 B.R. 201 (9th Cir.
25 BAP 1990): they are "the debtor's present and anticipated living
26 expenses and income; the age and health of the debtor and his or
27 her dependents; the debtor's ability to work and earn a living;
28 the debtor's training, job skills and education; the debtor's

1 other assets and their liquidity; the debtor's ability to save
2 for retirement; and any special needs of the debtor and his or
3 her dependents." 119 B.R. at 206 (emphasis added). If the
4 trustee is correct that the only issue is whether a retirement
5 plan is "necessary for support" at present, it is difficult to
6 see how the debtor's anticipated living expenses and income, his
7 or her age and health, and his or her ability to save for
8 retirement should be factors in the analysis at all.

9 The court in In re Pipkins, 2014 Bankr. LEXIS 2654 (Bankr.
10 N.D. Cal. 2014), directly addressed the issue the trustee raises.
11 In that case, the trustee contended, exactly like the trustee
12 here, that "the court should not consider any such [post-
13 petition] changed circumstances, as any determination of amounts
14 reasonably necessary for Debtors' support should be based on
15 Debtors' financial condition as of the petition date." 2014
16 Bankr. LEXIS 2654 at *27.³ The court rejected the trustee's
17 position. "While a 'debtor's exemption rights are determined as
18 of the petition date' [citing, like the trustee here, In re Kim,
19 257 B.R. 680 (9th Cir. BAP 2000)], a determination of the extent
20 to which assets are necessary for the support of debtors and
21 their dependents is necessarily a forward-looking one under
22 California law." Pipkins, 2014 Bankr. LEXIS 2654 at *27.

23 / / /

24
25 3. In the words of the trustee in the present case: "To
26 the extent that the Debtor wants to present evidence of changed
27 circumstances since he filed his Chapter 7 petition, the Court
28 should reject the attempt. Under Ninth Circuit BAP authority,
exemptions are determined as of the petition date. Cisneros v.
Kim (In re Kim), 257 B.R. 680, 687 (BAP 9th Cir. 2000)." Memo.
at 10:20-21.

1 Referring to the Moffat factors, the court stated,

2 If a court should consider 'anticipated living expenses
3 and income' to determine the extent to which an asset
4 is necessary for the debtor's reasonable support, the
5 court is not limited to considering a debtor's
6 financial condition as of the petition date.
7 Otherwise, a debtor who has no occupation or income as
8 of the petition date but has the ability to work and
9 earn a living soon thereafter could exempt all of the
10 asset as reasonably necessary for his or her support.
11 There would be no need for a court to consider that
12 debtor's ability to work, training, job skills or
13 education, and -- most importantly -- "anticipated"
14 expenses and income.

15 Id. at 27-28. The opposite is also true, as in this case. If a
16 court is limited to considering the debtor's financial condition
17 as of the petition date, when the debtor is presently working
18 and, in the trustee's words, able to "make ends meet," although
19 barely, there would be no need for the court to consider his age,
20 his likely remaining working years, his ability or inability to
21 save for retirement during those years, or the income and
22 expenses he can anticipate in his retirement years, all of which,
23 under the Moffat decision, are appropriate considerations.

24 Further, the trustee's theory does not make sense from a
25 policy standpoint. In In re McKown, 203 B.R. 722 (Bankr. E.D.
26 Cal. 1996), another department of this court held that IRAs are
27 sufficiently similar to pension or profit sharing plans to be
28 exempt under § 703.140(b)(10)(E). 203 B.R. at 726. In doing so,
the court reasoned:

IRAs and stock bonus, pension, profit sharing, and
annuity plans share a common denominator. They are
"aimed to enable working taxpayers to accumulate assets
during their productive years so that they might draw
upon them during retirement." The limitations placed
upon IRAs are geared to insure they are used to provide
income "during a taxpayer's advanced years, which is
the purpose shared by all retirement plans."

1 Id. at 724-25 (citation omitted). Application of the trustee's
2 theory - looking strictly at the debtor's present needs - would
3 deprive debtors of the assets they have managed to save, although
4 they will need those assets when they retire, simply because they
5 are still able to "make ends meet" with their present employment.
6 In short, it would undermine the purpose of IRAs and pension
7 plans by discouraging people from saving for retirement.

8 Finally, the trustee cites the well-known rule of statutory
9 construction that when one statute uses the same language as
10 another, the courts will infer Congress intended the same meaning
11 in both statutes. The trustee cites the Civil Procedure Code
12 sections governing the exemption of alimony (§
13 703.140(b)(10)(D)), payments on a wrongful death award or under a
14 life insurance policy, and payments on account of lost future
15 earnings (§ 703.140(b)(11)(B), (C), and (E)), all of which permit
16 an exemption to the extent the payments are reasonably necessary
17 for the support of the debtor and his dependents. In the
18 trustee's view, "[s]ince none of the[se] other statutes rely on a
19 debtor's retirement needs, it would be inappropriate to do so
20 here, notwithstanding that the issue is arising in connection
21 with a statute that involves retirement accounts." Initial Reply
22 at 7:28-8:2.

23 The trustee's analysis, ignoring as it does the nature of
24 the asset exempted by the particular statute, does not hold
25 water. As another department of this court observed:

26 Section 703.140(b)(10)(E) . . . permits the exemption
27 of a "right to receive" payments from a plan. The
28 statute does not specify a "present," "immediate,"
"existing," or "vested" right to receive payments. It
specifies only a "right to receive" a payment on

1 account of age. This looks forward into the future of
2 the debtor. The right to receive payments from the IRA
may be a present one or one which arises in the future.

3 In re McKown, 203 B.R. at 725. In this case, the debtor's right
4 to receive payments under the Plan without penalty, will, absent
5 a hardship, arise at retirement age. Although the statute
6 contains the same "reasonably necessary" language as those
7 exempting alimony, payments in compensation of lost earnings, and
8 so on, the statutes must be considered in light of the purpose of
9 the statute and the nature of the asset being exempted - here,
10 the right to receive retirement income. In this light, there is
11 no logical reason to consider the reasonably necessary test only
12 from the standpoint of the debtor's present financial
13 circumstances and not those that will pertain at the time his
14 "right to receive" the payments arises.

15 For these reasons, the court rejects the trustee's theory,
16 and will consider whether the Plan is reasonably necessary for
17 the debtor's support based on what his income and expenses are
18 likely to be in retirement and based on what changes are likely
19 to take place between now and then.

20 At the commencement of this case, the assets in the Plan
21 totaled \$409,383 in value. The debtor is 56 years old. The
22 court takes judicial notice that the average life expectancy of a
23 56-year old man in the United States as of May 1, 2016 is 27
24 years. Calculators: Life Expectancy. ssa.gov. Social Security
25 Administration. Web 12 May 2016. Assuming the debtor works nine
26 more years, his average life expectancy at retirement would be 18
27 years. Thus, assuming the debtor does not need to take hardship
28 distributions from the Plan in the next nine years (and the

1 evidence suggests he may need to), the court will need to
2 consider whether \$409,383 in assets is reasonably necessary for
3 18 years of retirement.

4 According to his schedules and statement of affairs, signed
5 under oath, the debtor is employed as a chip runner and dealer at
6 a casino, making \$2,130 per month gross, \$1,564 net. His
7 roommate, who is his girlfriend, contributes \$1,800 to the
8 household, for total household income of \$3,364. The debtor's
9 girlfriend is 50 years old. They pay \$1,525 per month in rent;
10 their other living expenses total \$1,790 per month, bringing
11 their total living expenses to \$3,315 and their monthly net
12 income to \$49, barely a break-even figure. The debtor's Schedule
13 J indicates he also contributes \$400 per month to college
14 expenses for his daughter; however, that expense brings the
15 household's monthly net income to <\$351>. The trustee does not
16 challenge any of the debtor's living expenses as unreasonable,
17 and the court finds them reasonable, even modest.⁴

18
19 4. The trustee cites the debtor's testimony at the § 341
20 meeting concerning a \$2,000 per quarter payment he receives on a
21 loan made by the Plan to a third party. Under a qualified
22 domestic relations order ("QDRO"), one-half of this payment goes
23 to the debtor's former spouse. Thus, the debtor receives \$1,000
per quarter, or \$333 per month, which would offset the <\$351>
shortfall on Schedule J. (Essentially, this payment covers the
debtor's contribution to his daughter's college expenses.)

24 The trustee notes that this income does not appear on the
25 debtor's Schedule I and the note does not appear in the list of
26 the Plan's assets on Schedule B. However, pursuant to Law v.
27 Siegel, 134 S. Ct. 1188, 1195 (2014), the court will not consider
28 those facts. For purposes of the present issue - whether the
Plan is reasonably necessary for the debtor's support - the
amount of the income, \$333 per month, is not sufficient to tip
the scale. According to a spreadsheet submitted as an exhibit by
the debtor, the principal balance of the note is \$25,692, of

(continued...)

1 The debtor's statement of affairs lists his 2015 year-to-
2 date income (that is, through August 14, 2015) as \$16,121, his
3 2014 income as \$10,919, and his 2013 income as \$44,858 plus
4 \$10,050 in unemployment. He also listed as income a \$3,704 tax
5 refund received in 2014 and \$12,600 in roommate contributions in
6 2015. The debtor supplemented his income in 2014 by selling a
7 2012 Kia Sportage, a 2008 Harley Davidson motorcycle, and a 2010
8 Harley Davidson motorcycle to his girlfriend for a total of
9 \$36,000. The debtor is a real estate broker; he operated a real
10 estate coaching business in Verdi, Nevada, between March of 2005
11 and December of 2011. According to his statement of affairs, the
12 debtor has lived in five different places in the last ten years,
13 including six months in an RV when he moved to Rocklin from
14 Nevada. The RV has since been repossessed.

15 The debtor owns no real property (except through the Plan,
16 which owns the vacant lot). His personal property assets as of
17 the petition date - other than the Plan - totaled \$32,289 in
18 value, including a 2008 Toyota with 83,000 miles, which he valued
19 at \$18,188 as of the petition date. With the exception of the
20 Toyota, which is his only vehicle, he has no assets he could sell
21 to generate any significant amount.

22 The debtor testifies his girlfriend lost her job in February
23 and is now contributing to the household income from
24 unemployment. He states they have had "rough patches" and have
25 no plans to marry. As regards the trustee's claim that the

26 _____
27 4.(...continued)
28 which one-half belongs to the debtor's ex-spouse under the QDRO.
The debtor's one-half interest is not sufficient to alter the
court's conclusion as to the reasonably necessary test.

1 debtor "has the skill/training to be a successful real estate
2 broker" (Memo. at 10-13-14), the debtor testifies he worked in a
3 Truckee resort area for 18 years, specializing in new
4 construction and representing home builders, not buyers and
5 sellers. He goes on:

6 When the real estate market changed, all the builders
7 left the area because the values dropped so
8 dramatically and [it] no longer made economic sense to
9 build[] [in] that area. As most if not all my trade
10 was local network based and these builders of new homes
11 did not relocate to the same area, I was bereft of all
12 my networking in a very narrow field of Real Estate.
13 In other words, my real estate market left me. After
14 trying Real Estate Coaching and Management, I did try
15 to start up my Real Estate business in Roseville,
16 however it is very expensive to start a new Real Estate
17 business in a new area and my efforts failed. Out of
18 desperation and with no one to take me in on their
19 brokerage without a book of business and recent sales,
20 I had to get a job that would pay me immediate income.

21 Debtor's Decl., DN 47 ("Decl."), at 4:21-5:9.

22 The court finds the debtor's testimony credible and the
23 trustee offers none to the contrary. He merely believes, based
24 on the fact that the debtor was able to build up \$409,383 in
25 assets in the Plan over his career, "he should be able to make a
26 very good living in real estate." Memo. at 10:15-16. On the
27 contrary, a total of \$409,383 in retirement assets is not overly
28 large for virtually an entire career. And the debtor's income in
29 and since 2013 does not support the trustee's conclusion. In the
30 circumstances described by the debtor, and given his age and
31 unsuccessful attempt to make a new start in real estate, the
32 debtor has demonstrated, and the court finds, it is unlikely the
33 debtor will again be, in the trustee's words, "a successful real
34 estate broker," regardless of his skills and training.

35 / / /

1 Finally, the debtor states, "I have calculated that I would
2 receive \$2200 per month maximum from Social Security and I have
3 no other pensions or retirements other than the Pomeroy
4 Retirement Trust Plan. The Real Estate market will never again
5 be what it was in my lifetime and I will have no foreseeable way
6 to add to my retirement funds. I have no other assets of
7 significance and my job is an 'at will' employment." Decl. at
8 5:12-16.

9 The court agrees: it is unlikely the debtor will be able to
10 contribute any amount to retirement savings before he retires;
11 thus, if his exemption of the Plan were disallowed, he would have
12 virtually no income he could depend on in retirement except
13 social security. Although the debtor presently receives
14 contributions from his girlfriend, she is under no legal
15 obligation to continue making them. For purposes of this
16 analysis, the court declines to assume she or anyone else will be
17 willing and able to contribute to the debtor's household income
18 once he retires.

19 The trustee has not challenged the debtor's estimate of
20 \$2,200 per month from social security, and the court will accept
21 that figure as the amount the debtor is likely to have in income
22 when he retires, absent the Plan. That modest amount would
23 clearly be insufficient to pay his reasonable living expenses,
24 which at present, total \$3,315 (not including his contributions
25 to his daughter's college expenses). The court finds that to be
26 a reasonable figure for a single individual and does not believe
27 a significantly lower total could be achieved if the debtor's
28 girlfriend did not live with him. Using these figures, the

1 debtor's income would be short by \$1,115 per month of meeting his
2 current expenses. The debtor's health-related expenses will
3 likely increase as he ages, which would only increase the
4 shortfall. The court is not willing to speculate that the
5 debtor's girlfriend, who has no legal obligation to do so, will
6 continue to contribute \$1,800 per month to his household income.
7 Without that contribution, the debtor would need to deplete the
8 Plan assets significantly even before he retires. The court will
9 not speculate that what remains when he retires will be
10 sufficient to fund his retirement.

11 Given the debtor's age and likely inability to save anything
12 further for retirement, he would reasonably be expected to invest
13 the Plan assets in conservative investments not likely to
14 generate significant income. Nor, given recent economic history,
15 would the value of the Plan reasonably be expected to grow
16 significantly over the next 10 years. In short, given the
17 debtor's age, his likely life expectancy, his meager income at
18 this time and likely for the rest of his working life, the
19 relatively modest amount he may expect from social security in
20 retirement, the very basic level of his living expenses, and the
21 fact that he has little, if any, assurance of being able to meet
22 those expenses while he is still working, let alone after
23 retirement, the court readily concludes the Plan is reasonably
24 necessary for the debtor's support, and the Plan is therefore
25 exempt under § 703.140(b)(10)(E).

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1 Bankruptcy Code § 522(b)(3)(C) and (4)

2 The Vacant Lot

3 Subdivisions 522(b)(3)(C) and (4) were added to the
4 Bankruptcy Code effective in 2005 to "supplement[] the exemptions
5 an opt-out state debtor may take." Mullen v. Hamlin (In re
6 Hamlin), 465 B.R. 863, 870 (9th Cir. BAP 2012). They permit a
7 debtor to exempt "retirement funds to the extent that those funds
8 are in a fund or account that is exempt from taxation" under
9 certain sections of the Internal Revenue Code. The trustee
10 contends the term "retirement funds," as used in the statute,
11 includes only "sums of money" and not real property. He relies
12 exclusively on an incomplete dictionary quotation in Clark v.
13 Rameker, 134 S. Ct. 2242 (2014), and the general rule of
14 statutory construction that Congress says what it means in its
15 statutes and means what it says. The trustee interprets Clark as
16 having "adjudicated the plain meaning of the term 'retirement
17 funds.'" Memo. at 15:18-19. That is not the case. The language
18 the trustee relies on is not even dicta; it is an ellipsis in a
19 dictionary definition as quoted by the Court.

20 The court will begin with what Clark actually adjudicated,
21 as it sheds light on just how misplaced the trustee's reliance on
22 the ellipsis is. The Court held that inherited IRAs are not
23 exempt under § 522(b)(3)(C). Clark, 134 S. Ct. at 2244. The
24 Court's analysis was devoted exclusively to the notion that
25 traditional IRAs are accounts that are "set aside for the day
26 when an individual stops working" (id. at 2246), whereas funds in
27 inherited IRAs "are not objectively set aside for the purpose of
28 retirement." Id. at 2247. The Court considered three

1 distinctions between traditional and inherited IRAs.

2 First, the holder of an inherited IRA may never invest
3 additional money in the account. Inherited IRAs are
4 thus unlike traditional and Roth IRAs, both of which
5 are quintessential "retirement funds." For where
6 inherited IRAs categorically prohibit contributions,
7 the entire purpose of traditional and Roth IRAs is to
8 provide tax incentives for accountholders to contribute
9 regularly and over time to their retirement savings.

10 Second, holders of inherited IRAs are required to
11 withdraw money from such accounts, no matter how many
12 years they may be from retirement. . . . That the tax
13 rules governing inherited IRAs routinely lead to their
14 diminution over time, regardless of their holders'
15 proximity to retirement, is hardly a feature one would
16 expect of an account set aside for retirement.

17 Finally, the holder of an inherited IRA may withdraw
18 the entire balance of the account at any time - and for
19 any purpose - without penalty. Whereas a withdrawal
20 from a traditional or Roth IRA prior to the age of 59½
21 triggers a 10 percent tax penalty subject to narrow
22 exceptions - a rule that encourages individuals to
23 leave such funds untouched until retirement age - there
24 is no similar limit on the holder of an inherited IRA.
25 Funds held in inherited IRAs accordingly constitute "a
26 pot of money that can be freely used for current
27 consumption," not funds objectively set aside for one's
28 retirement.

17 Id. (citations omitted).

18 The entire focus of the decision was on the purpose of
19 traditional IRAs as opposed to inherited IRAs - to encourage
20 saving for retirement. The decision has nothing to do with what
21 types of assets may be held in IRAs or other retirement plans for
22 purposes of the definition of "retirement funds" in §
23 522(b)(3)(C). There is no reason to suppose the Court intended
24 to exclude from the definition of "retirement funds" real
25 property, stocks, bonds, gold, or any other type of asset often,
26 if not commonly, held in traditional and Roth IRAs. The court
27 agrees with another department of this court on the issue:

28 / / /

[T]he court is not prepared to conclude that "retirement funds" exclude real property assets. All IRAs have some form of investment assets. Most often, IRAs hold liquid assets, including stocks and/or bonds. But IRAs rarely have only "funds" in the strictest sense of that word. Thus, to construe "retirement funds" to exclude assets, whether stocks, mutual funds, bonds, or real estate, would make the § 522(b)(3)(C) exemption largely unusable.

In re Williams, 2011 Bankr. LEXIS 5584, *24 (Bankr. E.D. Cal. 2011) (J. McManus).

Returning to the language the trustee relies on in Clark, it is this:

The Bankruptcy Code does not define "retirement funds," so we give the term its ordinary meaning. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. ___, ___, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014). The ordinary meaning of "fund[s]" is "sum[s] of money . . . set aside for a specific purpose." American Heritage Dictionary 712 (4th ed. 2000). And "retirement" means "[w]ithdrawal from one's occupation, business, or office." Id., at 1489. Section 522(b)(3)(C)'s reference to "retirement funds" is therefore properly understood to mean sums of money set aside for the day an individual stops working.

Clark, 134 S. Ct. at 2246 (emphasis added). The trustee relies on this language for his definition of "retirement funds" as "sum[s] of money" and not real property. This interpretation hinges on the ellipsis - the missing words in the dictionary definition as quoted by the Court - the words represented by ". . .". The actual definition of "fund" in the dictionary the Court used is: "sum of money or other resources set aside for a specific purpose." "fund." AHDictionary.com. American Heritage Dictionary, 2016. Web. 23 May 2016.⁵

5. The dictionary provides a second distinct definition of "fund": "Available money; ready cash; short on funds." Id. It (continued...)

1 The trustee believes the Supreme Court's omission of the
2 words "and other resources" in its quotation from the dictionary
3 necessarily means the Court intended to define "retirement
4 funds," for purposes of § 522(b)(3)(C), as excluding "other
5 resources"; that is, resources other than "sums of money." The
6 trustee is not correct. First, the nature of the assets in the
7 retirement account at issue in Clark, as either money,
8 investments, gold, real property, or some other type of property,
9 had nothing to do with the outcome of the case. The outcome
10 hinged entirely on the legal differences between an IRA inherited
11 by the debtor and an IRA created and funded by the debtor.
12 Second, the trustee's argument overlooks or disregards the
13 statement in Clark that traditional and Roth IRAs, unlike
14 inherited IRAs, "are quintessential 'retirement funds.'" 134 S.
15 Ct. at 2247. If the trustee's interpretation were correct, that
16 statement would have to be rephrased as "some traditional and
17 Roth IRAs are quintessential 'retirement funds'; many others -
18 those containing anything other than money - are not retirement
19 funds at all."

20 The court is persuaded the Supreme Court could not have
21 intended to make, by nothing more than omitting the words "or
22 other resources" from a dictionary definition, such a new and
23 wide-ranging announcement of the definition of "retirement funds"
24 as excluding entire categories of assets commonly held in IRAs,
25 Roth IRAs, and other retirement plans. If the Court had intended
26

27 5. (...continued)
28 appears this is the definition the trustee would prefer; it is
not the one chosen, however, by the Court in Clark.

1 to exclude from the definition all types of assets other than
2 "sums of money" - stocks, bonds, interests in mutual funds,
3 commodities, real property - it would have been far more
4 explicit.

5 Finally, the trustee's restrictive reading of "retirement
6 funds" runs counter to Congress' intent in enacting §
7 522(b)(3)(C), which was "to preempt conflicting state exemption
8 laws and 'to expand the protection for tax-favored retirement
9 plans or arrangements that may not be already protected under [§]
10 541(c)(2) pursuant to *Patterson v. Shumate*, or other state or
11 Federal law.'" Hamlin, 465 B.R. at 870, quoting H. R. REP. NO.
12 109-31(I), pt.1 at 63-64 (2005), as reprinted in 2005
13 U.S.C.C.A.N. (Legislative History) 88, 132-33 (emphasis added).

14 The Wells Fargo Bank and Scottrade Accounts

15 The trustee contends the funds in the Wells Fargo Bank and
16 Scottrade accounts are not exempt because they are not part of
17 the Plan to begin with. The trustee relies on (1) the Business
18 Account Application under which the Wells Fargo account was
19 opened (the "Application"); and (2) two checks drawn on that
20 account which the debtor used to open and later transfer
21 additional funds to the Scottrade account. (Thus, if the Wells
22 Fargo account is not part of the Plan, the Scottrade account is
23 not either, as the funds in that account were drawn from the
24 Wells Fargo account.) In the trustee's view, the Application
25 demonstrates that the debtor opened the account in his individual
26 name, and thus, the account is a personal account and not an
27 account belonging to the Plan. The debtor has submitted a copy
28 of the check he used to open the Wells Fargo account - it is

1 drawn on an account at U.S. Bank entitled, as imprinted on the
 2 check, Pomeroy Retirement Trust, Scott C. Pomeroy, Trustee. The
 3 trustee does not admit, but he also does not dispute, that the
 4 funds transferred by way of that check were funds belonging to
 5 the Plan.⁶

6 The Application is confusing. It is on a Wells Fargo
 7 pre-printed form and, as the typed or printed information added
 8 to the form includes numbers that would have been known only to
 9 the bank, it was presumably typed or printed from information
 10 entered by the bank's representative, not the debtor. Page 1 of
 11 the form includes blanks for information about "Customer 1" and
 12 "Customer 2," which were completed as follows:

13 Customer 1 Name:	Scott C. Pomeroy
14 Account Relationship:	Sole Owner

15 Customer 2 Name:	Pomeroy Retirement Trust
16 Account Relationship:	Associated Party

17 These entries create ambiguity as to whether the account belongs
 18 to the debtor or the Plan. Page 2 of the Application has blanks
 19 for "Customer 1 Information," which include the following:

20 Customer Name:	Pomeroy Retirement Trust
21 Account Relationship:	Associated Party
22 Taxpayer Identification Number:	XXXX4667 [the Plan's TIN]
23 Business Type:	Sole Proprietorship
24 Date Originally Established:	01/01/1994 [the date the Plan was created]

25 At the bottom of page 2, for "Bank Use Only," are these entries
 26 (among others):

27 / / /

28 6. "The source of the deposited funds may have been the
 Plan, but the account [at Wells Fargo] was opened by the Debtor
 in his individual name" Memo. at 12:21-22.

1 Name/Entity Verification: Other Agreement
Filing State: CA
2 Customer 1 Name: Pomeroy Retirement Trust
3 Page 3 has blanks for "Sole Proprietor 1 Information," which
4 include the following:
5 Customer Name: Scott C. Pomeroy
Position/Title: real estate
6 Taxpayer Identification Number: XXXX8236 [the debtor's social
security number]
7

8 Finally, Page 4 is the signature page; it reads:

9 Certified/Agreed To
Owner/Key Individual 1 Name: Scott C. Pomeroy
10 Position/Title: real estate

11 And it bears the debtor's signature; the word "trustee" does not
12 appear behind the signature.

13 Thus, these facts support the trustee's position: (1) the
14 debtor signed the application without using the word "trustee";
15 (2) the Application refers to the debtor as the customer in two
16 places - under "Customer 1 Name" and "Customer Name"; and (3) the
17 Application refers to the debtor's Account Relationship as "Sole
18 Owner." On the other hand, (1) the Application refers to the
19 debtor as "Owner/Key Individual" (on page 4), which reasonably
20 should be construed to mean the debtor is the owner of the
21 account or the key individual in the entity that owns the
22 account; (2) the Application refers to the Plan twice as the
23 "Customer," albeit one of those times as "Customer 2"; (3) the
24 pre-printed portion of the Application states that "[t]he
25 Customer has approved this Certificate of Authority or granted
26 each person who signs the 'Certified/Agreed To' section of this
27 Application the authority to do so on the Customer's behalf by: .
28 . . the signature of each of the Customer's trustee(s), if the

1 Customer is a trust . . .," which lessens the significance of the
2 debtor's signature without "Trustee" behind it; and (4) the
3 reference to "Other Agreement" under "Name/Entity Verification,"
4 which suggests the bank representative reviewed the agreement
5 under which the Plan was created. If the debtor were to be the
6 owner of the new account, the bank representative would not have
7 required that verification.

8 In addition, and of significance, the debtor made the U.S.
9 Bank check by which he opened the account payable to Pomeroy
10 Retirement Trust, signed it as Scott C. Pomeroy, Trustee, and
11 endorsed it as Scott C. Pomeroy, Trustee. On the deposit slip,
12 under "For Deposit to the Account of," the debtor wrote Pomeroy
13 Retirement Trust. The checks on the account are imprinted
14 "Pomeroy Retirement Trust, Scott C. Pomeroy, Trustee," and of the
15 six checks submitted by the trustee, the debtor signed five of
16 them "Scott C. Pomeroy, Trustee." He testifies he omitted
17 "Trustee" after his signature on the sixth check because he was
18 in a hurry. His habit is to sign with "Trustee." He adds that
19 the only checks he has written from the account have been for
20 property taxes and association dues on the vacant lot and to make
21 the two transfers to open and then add to the Scottrade account.
22 The Scottrade account statements are issued to "Scott C. Pomeroy
23 TTEE, Pomeroy Retirement Trust Plan, U/A DTD 1/01/1994."

24 Finally, the debtor has submitted declarations of Ben
25 Eastman, the president of Pension Services, Inc., who created,
26 administered, and advised the debtor on the management of the
27 Plan since its creation in 1994, and David M. Kahn, a
28 Pennsylvania attorney who has specialized for 25 years in ERISA

1 compliance, including as an investigator and manager with the
2 U.S. Department of Labor's Employee Benefit Security
3 Administration. The court finds that both are well-qualified to
4 offer the opinions they testify to. Mr. Eastman and Mr. Kahn
5 have both examined the Application. Mr. Eastman notes Wells
6 Fargo accepted the debtor's signature on the Application without
7 the "Trustee" suffix, and testifies it is common for a bank to
8 accept a trustee's signature without the suffix. Mr. Kahn
9 testifies the use of the Plan's tax ID number as well as the
10 individual's for the creation of the account is uniform in his
11 experience.

12 At the initial hearing, although not in his initial reply,
13 the trustee challenged Mr. Eastman's and Mr. Kahn's
14 qualifications to testify as experts on the subject of banking,
15 and suggested the court hold an evidentiary hearing with someone
16 to testify as to whether Wells Fargo Bank saw the Application as
17 opening a trust account or a personal account. The court finds
18 the many ways in which the Bank has treated this as a trust
19 account, discussed above, to be sufficient on the subject. To
20 conclude, based on Mr. Eastman's and Mr. Kahn's testimony and the
21 court's own analysis, above, the court concludes that the Wells
22 Fargo and Scottrade accounts are assets of the Plan.

23 The Plan as Tax Exempt

24 With regard to the Plan as a whole; that is, as to both the
25 vacant lot and the Wells Fargo and Scottrade accounts, the
26 trustee contends the Plan does not qualify as exempt under §
27 522(b)(3)(C) because the debtor has not demonstrated it is exempt
28 from taxation under § 401, 403, 408, 408A, 414, 457, or 501(a) of

1 the Internal Revenue Code. There are alternative tests for
2 making this determination. First, if the Plan has received a
3 favorable determination under Internal Revenue Code § 7805 and
4 the determination is in effect as of the petition date, the Plan
5 will be presumed to be exempt. Bankruptcy Code § 522(b)(4)(A).
6 If there has been no favorable determination, the debtor must
7 demonstrate either (1) that no prior determination to the
8 contrary has been made by a court or the IRS and that the Plan is
9 in substantial compliance with the applicable requirements of the
10 Internal Revenue Code; or (2) that the Plan fails to be in
11 substantial compliance with those requirements and the debtor is
12 not materially responsible for that failure. § 522(b)(4)(B).

13 The debtor has submitted what he contends is a favorable
14 determination letter from the IRS. The letter constitutes an
15 approval of the form of Pension Services, Inc.'s volume submitter
16 profit sharing plan. The letter begins, "In our opinion, the
17 form of the plan identified above is acceptable under section 401
18 of the Internal Revenue Code for use by employers for the benefit
19 of their employees." Debtor's Ex. G. The Plan in this case has
20 adopted that form plan (Trustee's Ex. 1, DN 40, pp. 4-17), and
21 both Mr. Eastman and Mr. Kahn testified initially that the Plan
22 "falls under" that letter of determination and is a qualified
23 retirement plan. At the initial hearing, however, the trustee's
24 counsel challenged the IRS letter as merely a blanket approval of
25 a form plan, not an approval of the specific plan in this case.

26 In response, the debtor has submitted supplemental
27 declarations in which Mr. Eastman and Mr. Kahn testify that a
28 "volume submitter approval letter serves as a pre approval

(without the need for a separate approval letter from the IRS) on a retirement plan, as long as the plan conforms to the approved plan related to the volume submitter." Eastman Supp. Decl., DN 53, ¶ 4; Kahn Supp. Decl., DN 54, ¶ 4. They add that the Plan in this case conforms to Pension Services, Inc.'s form plan approved by the IRS letter, and Mr. Eastman adds that the IRS letter was still active on the date this case was filed, August 14, 2015. Both Mr. Eastman and Mr. Kahn also testify that in their experience, when the IRS issues a determination that a particular plan is not approved, "those determinations are issued within 3 years or less of the first tax return." Eastman Supp. Decl., ¶ 5; Kahn Supp. Decl., ¶ 5. Mr. Eastman testifies the Plan has been in existence since 1994 and no contrary determination has been issued for either the volume submitter form plan or the debtor's plan.

In light of the court's finding that Mr. Eastman and Mr. Kahn qualify to give an expert opinion as to the status of the Plan, in light of their conclusions that the Plan "falls under" the IRS approval letter and conforms to the approved form plan such that no additional approval letter is needed, and where there is no evidence to the contrary, the court concludes the IRS letter is equivalent to a favorable determination as to the Plan, within the meaning of § 522(b)(4)(A). Although the letter itself states it is not a determination as to whether an employer's plan qualifies under Internal Revenue Code § 401(a), it also states that an employer that adopts the form plan may rely on the letter with respect to the qualification of its particular plan in certain circumstances. The letter cites Rev. Proc. 2005-16,

1 which includes provisions delineating the circumstances in which
2 an employer can rely on an opinion letter governing a volume
3 submitter form plan as applying also to the employer's specific
4 plan (see Rev. Proc. 2005-16, § 19.02), in which case the opinion
5 letter is the equivalent of a favorable determination letter.
6 Id. at § 19.04.⁷ It is appropriate to infer from Mr. Eastman's
7 and Mr. Kahn's testimony, and the court does infer, that the IRS
8 letter is equivalent to a favorable determination concerning the
9 Plan in this case. In fact, they could not have testified as
10 they did if they were not satisfied the necessary circumstances
11 were present.⁸

12 In his response to Mr. Eastman's and Mr. Kahn's supplemental
13 declarations, the trustee cites three cases for his proposition
14 that "an opinion letter regarding the acceptability of a 'master'
15 or 'prototype' plan is not the same as a determination letter for
16 the terms of a particular plan." Trustee's Reply to Supplemental
17 Declarations, DN 57 ("Supp. Reply"), at 3:22-24. Those cases are
18 distinguishable. In two of them, RES-GA Dawson, LLC v. Rogers
19 (In re Rogers), 538 B.R. 158 (Bankr. N.D. Ga. 2015), and Agin v.

20
21 7. Rev. Proc. 2015-36 appears to be the most recent updated
22 version of Rev. Proc. 2005-16. It contains virtually identical
provisions. See Rev. Proc. 2015-36, §§ 19.02, 19.04.

23 8. Mr. Eastman and Mr. Kahn were not required to list the
24 particular circumstances in which a letter approving a form plan
25 is the equivalent of a favorable determination of a specific
26 plan, to list all of the exceptions to those circumstances, and
27 to discuss the debtor's plan in terms of every one of those.
28 Their conclusions and the reasons for them are sufficient. "An
opinion is not objectionable just because it embraces an ultimate
issue." Fed. R. Evid. 704(a). "Unless the court orders
otherwise, an expert may state an opinion--and give the reasons
for it--without first testifying to the underlying facts or
data." Fed. R. Evid. 705.

1 Daniels (In re Daniels), 452 B.R. 335 (Bankr. D. Mass. 2011),
2 there was no evidence from anyone other than the debtor; thus,
3 there was no expert testimony linking the debtor's plan with the
4 IRS letter approving the form plan. In the third, In re Bauman,
5 2014 Bankr. LEXIS 742 (Bankr. N.D. Ill. 2014), the owner of the
6 pension company that administered the debtor's plan testified,
7 but the court found his testimony to be contradicted by the
8 documentary evidence (2014 Bankr. LEXIS 742 at *5-7 and n.4) and
9 otherwise insufficient (id. at *24 ["Ronczkowski could not
10 explain the variances."]). Further, there was no testimony
11 identifying the debtor's plan with the IRS letter approving the
12 form plan. See id. at *42, n.15.

13 Unlike the cases cited by the trustee, where the courts
14 found either no evidence or insufficient evidence, the court in
15 In re Gilbraith, 523 B.R. 198 (Bankr. D. Ariz. 2014), cited Rev.
16 Proc. 2005-16 and found that the evidence in that case supported
17 the conclusion that IRS letters approving the prototype plan
18 created by the debtor's attorneys for the use of their employer
19 clients were the equivalent of a favorable determination of the
20 debtor's particular plan. 523 B.R. at 208. In the present case,
21 given the testimony of Mr. Eastman and Mr. Kahn, whom the court
22 has found qualified to render an expert opinion on the status of
23 the debtor's Plan, and given the absence of any contrary
24 evidence, the court finds the IRS letter, Debtor's Exhibit G,
25 qualifies as a favorable determination of the Plan, under §
26 522(b)(4)(A); thus, the Plan is presumed exempt. The trustee has
27 not rebutted that presumption.

28 / / /

1 However, the court will also assume for the sake of argument
2 that the letter is not a favorable determination as to the Plan,
3 within the meaning of § 522(b)(4)(A), and consider whether no
4 prior determination to the contrary has been made by a court or
5 the IRS and whether the Plan is in substantial compliance with
6 the applicable requirements of the Internal Revenue Code, such
7 that the Plan would be exempt under § 522(b)(4)(B) if it were not
8 exempt under § 522(b)(4)(A). By its terms, the statute puts the
9 burden of proof on the debtor. See § 522(b)(4)(B); Diamond v.
10 Trawick (In re Trawick), 497 B.R. 572, 585 (Bankr. C.D. Cal.
11 2013). The trustee concedes the first point - that there has
12 been no prior determination as to the Plan that was contrary to a
13 favorable determination. As to the second, the court finds Mr.
14 Eastman and Mr. Kahn are qualified to render expert opinions as
15 to IRS requirements for tax-exempt retirement accounts and to
16 render an opinion as to whether the Plan satisfies those
17 requirements. Both testify the Plan is tax-exempt.

18 Mr. Eastman testifies he has administered the Plan and
19 advised the debtor on its management since the Plan was created
20 in 1994. He has met with the debtor at least once each year to
21 discuss the permitted contribution amounts and actions that could
22 be taken by the trust, including "the options for participant
23 loans, hardship withdrawals, the division of the retirement upon
24 [the debtor's] divorce, and investment avenues to diversify the
25 retirement funds." Eastman Decl., DN 45, ¶ 11(a). He adds, "I
26 have reviewed the history of [the debtor's] actions related to
27 the trust and find nothing that would invalidate the trust[']s
28 protection and treatment under Section 401(a), 403(a), 403(b),

1 408, or 408A of the Internal Revenue Code of 1986" (id. at ¶ 12),
2 and he concludes that the Plan is a qualified retirement plan
3 exempt from taxation. In his supplemental declaration, he adds
4 that the Plan "is in compliance with the Internal Revenue Code
5 both today and on the date of filing referenced above." Eastman
6 Supp. Decl., DN 53, at ¶ 5(c).

7 Mr. Kahn, who has been in the field for 25 years, testifies,
8 "I have familiarized myself with the provisions of the Pomeroy
9 Retirement Trust Plan and find that it meets all the requirements
10 of Section 401(a), 403(a), 403(b), 408, or 408A of the Internal
11 Revenue Code of 1986 as a qualified retirement [plan]." Kahn
12 Decl., DN 46, ¶ 13. Both Mr. Eastman and Mr. Kahn have testified
13 the Plan conforms to Pension Services, Inc.'s volume submitter
14 form plan, which has been approved by the IRS as "acceptable
15 under section 401 of the Internal Revenue Code for use by
16 employers for the benefit of their employees." Debtor's Ex. G.
17 The debtor testifies he has received "no negative treatments or
18 determinations from the IRS for the entire existence of the
19 [Plan]." Pomeroy Decl., DN 55, ¶ 6.

20 As against this evidence, the trustee's arguments are not
21 persuasive. He places great emphasis on the use of the
22 disjunctive in the phrase "Section 401(a), 403(a), 403(b), 408,
23 or 408A of the Internal Revenue Code" in the declarations,
24 concluding by inference that the declarants "have no idea what
25 the applicable statute is." Supp. Reply at 8:9. Mr. Eastman's
26 and Mr. Kahn's respective levels of experience and expertise
27 preclude that possibility. Further, the court can itself
28 determine - from the IRS's letter alone - that the applicable

1 section is § 401(a), governing pension, profit-sharing, and stock
2 bonus plans, as opposed to § 403 (employee annuities), § 408
3 (IRAs), or § 408A (Roth IRAs).

4 Second, the trustee finds Mr. Eastman's and Mr. Kahn's
5 testimony too conclusory. He would apparently require testimony
6 that "the operation of the Plan, over the years since it was
7 established in 1994, has always been in compliance with either
8 the terms of the Plan or the requirements of the Internal Revenue
9 Code" (Supp. Reply at 9:9-11), and he complains there is no
10 testimony about the "specific amounts contributed to the Plan,
11 the source of contributions to the Plan, maintenance of the Plan
12 assets in trust, disbursements by the Plan, investments made by
13 the Plan, rollovers (if any), division of the plan assets with
14 the Debtor's former spouse in connection with their divorce, or
15 the requirements for taking a hardship distribution from the
16 Plan." Id. at 9:11-15. These arguments are red herrings. This
17 level of detail and a time frame covering decades is simply not
18 required by the statute, which requires only that the Plan be
19 "exempt from taxation" under federal law, which may be proven by
20 a showing that the Plan "is in substantial compliance" with the
21 applicable provisions of the Internal Revenue Code.

22 The trustee cites no authority for these extraordinary
23 requirements except cases concerning conclusory allegations
24 unsupported by facts as being insufficient to raise a triable
25 issue of material fact in opposition to a summary judgment
26 motion. The cases cited do not concern expert testimony, as to
27 which the rules differ. In arriving at a "proper accommodation
28 between [Fed. R. Civ. Proc.] 56(e) [now 56(c)(4)] and Fed. R.

1 Evid. 705," the Ninth Circuit has held that "[e]xpert opinion is
2 admissible and may defeat summary judgment if it appears the
3 affiant is competent to give an expert opinion and the factual
4 basis for the opinion is stated in the affidavit, even though the
5 underlying factual details and reasoning upon which the opinion
6 is based are not. If further facts are desired, the movant may
7 request and the district court may require their disclosure."
8 Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1986).⁹

9 Applying this accommodation, the court is satisfied the
10 expert testimony sufficiently states a factual basis for the
11 opinions offered. The fact that Mr. Eastman has played a regular
12 and active role in administering the Plan and advising the debtor
13 about the permitted contribution amounts, the options for
14 participant loans, hardship withdrawals, the division of the plan
15 assets with the debtor's former spouse, and appropriate
16 investment vehicles is significant. The trustee contends Mr.
17 Eastman's conclusion that he has "reviewed the history of [the
18

19 9. "Unless the court orders otherwise, an expert may state
20 an opinion--and give the reasons for it--without first testifying
21 to the underlying facts or data. But the expert may be required
22 to disclose those facts or data on cross-examination." Fed. R.
23 Evid. 705. In his initial reply, the trustee said this about Mr.
24 Eastman and Mr. Kahn: "[E]xcept for conclusory and ambiguous
25 statements contained in declarations from professionals in the
26 field, who may or may not be qualified to provide expert
27 testimony, there is nothing to show that the Debtor's plan is
28 qualified under the Internal Revenue Code." Initial Reply at
1:1-4. Although the debtor had offered in his opposition to make
his expert witnesses available at an evidentiary hearing, the
trustee did not take the debtor up on that offer, and did not
request an evidentiary hearing in his initial reply, as required
under LBR 9014-1(f)(1)(C). The trustee did request an
evidentiary hearing at the initial hearing, after the court had
issued its original tentative ruling, but only with regard to the
issue of the debtor's application to open the Wells Fargo Bank
account.

1 debtor's] actions related to the trust and find[s] nothing that
2 would invalidate the trust[']s protection and treatment" under
3 the Internal Revenue Code has "no facts to back it up." Supp.
4 Reply at 10:13. It is difficult to know what the trustee would
5 require unless it is a list of every possible action that could
6 disqualify a retirement plan as tax exempt, with facts to prove a
7 negative: that the debtor has not taken any of them. Here, both
8 Mr. Eastman and Mr. Kahn have addressed in factual terms the
9 particular issues raised by the trustee - the hardship
10 distributions, the QDRO distributions, and the Wells Fargo Bank
11 account application. Mr. Kahn, for example, states that in other
12 cases he has been involved in,

13 the IRS has never sought nor asserted a right to
14 invalidate such a retirement plan due to undocumented
15 participant loans or other minor errors such as
16 forgetting to add "trustee" or "TTEE" at the signature
17 line. In fact, the standard course of action in such
18 cases is to document such loans retroactively and pay a
19 small penalty for the failure or to consider them
20 retroactive hardship withdrawals and to pay the
21 taxation on the withdrawal. I have never seen the IRS
22 use either the documentation of a participant loan or a
23 vague bank account application as a reason to
24 invalidate a qualifying retirement [plan].

25 Kahn Decl. at 3:6-13. The court finds this and Mr. Eastman's
26 testimony to be sufficient.

27 Finally, the trustee cites the "voluminous discussion" in
28 Internal Revenue Code § 4975 of prohibited transactions -
transactions that may result in disqualification of a retirement
plan from tax-exempt status - and suggests the debtor should have
tackled that discussion in order to demonstrate that the Plan is
in substantial compliance with the Internal Revenue Code. "The
Trustee will not attempt to prove or disprove whether the Debtor

1 has engaged in prohibited transactions. It was up to the Debtor
2 to deal with the fact that he may have engaged in prohibited
3 transactions, or to present evidence that he did not engage in
4 any prohibited transactions" Supp. Reply at 9:20-23.
5 The court disagrees. The statute contains a list of prohibited
6 transactions followed by a much longer list of exemptions from
7 prohibited transactions, followed by a list of "special rules,"
8 including a list of transactions to which certain of the
9 exemptions do not apply, and so on. It seems the trustee would
10 extend the debtor's burden of proof as to the § 522(b)(4)(B)
11 showing to cover every possible way in which a retirement plan
12 can be disqualified, even as to particular types of transactions
13 no one has suggested occurred here. Simply put, the court does
14 not view the burden of proof in that way.

15 The trustee's only suggestion that the debtor has done
16 anything wrong - apart from the Wells Fargo Bank account
17 application - is that the debtor has deposited repayments on a
18 loan made by the Plan to a third party into his personal bank
19 account. The trustee characterizes this conduct as follows:

20 [The debtor] essentially admits that he diverted loan
21 repayments for a loan made by his Plan into his own
22 pocket, without reporting the receipt of income and
23 without reimbursing the Plan. He now says that he
24 intends to treat the monies received as a "hardship
25 distribution" and amend his last three years taxes to
26 acknowledge the receipt of unreported income. He
27 completely fails to address whether the improper
28 handling of the loan repayments for at least three
years might have been a prohibited transaction which
would disqualify his Plan as a valid retirement plan.

26 Supp. Reply at 11:6-12.

27 On the contrary, Mr. Eastman testifies the loan repayments
28 will be treated as hardship distributions, the debtor will pay

1 the appropriate taxes and penalty, and neither documenting the
2 repayments in that fashion nor the hardship withdrawals
3 themselves will invalidate the Plan's tax-exempt status. Mr.
4 Kahn testifies he has never seen the IRS seek to invalidate a
5 retirement plan due to undocumented participant loans, and that
6 the standard course of action in such cases is to document the
7 loans retroactively and pay the tax on the withdrawals.

8 The Internal Revenue Code itself does not provide for
9 disqualification of a plan based on a prohibited transaction.
10 Instead, "[t]here is hereby imposed a tax on each prohibited
11 transaction. The rate of tax shall be equal to 15 percent of the
12 amount involved" 26 U.S.C. § 4975(a). And "[g]enerally,
13 the occurrence of a prohibited transaction does not disqualify a
14 profit sharing plan" RES-GA Dawson, LLC v. Rogers (In re
15 Rogers), 538 B.R. 158, 169 (Bankr. N.D. Ga. 2015). On the other
16 hand, "if a multitude of prohibited transactions exist, such that
17 the form of the profit sharing plan is being abused, then the
18 plan may no longer be qualified." Id.; see also Agin v. Daniels
19 (In re Daniels), 452 B.R. 335, 350-51 (Bankr. D. Mass. 2011).

20 For example,

21 Rather than do what was necessary for favorable tax
22 treatment under the IRC, Bauman treated the Plan as
23 little better than a fancy bank account. Ignoring the
24 Plan documents and the law, Bauman added money to the
25 Plan - lots of it - whenever he felt like it. Bauman
26 then withdrew money from the Plan after his retirement,
27 although he was not entitled to any distributions, in
amounts that made no sense. The contributions as well
as the distributions failed to comply with the IRC and
disqualified the Plan from favorable tax treatment.
The Bauman Venture Plan was a mere facade, a pension
plan in name only.

28 In re Bauman, 2014 Bankr. LEXIS 742, *53 (Bankr. N.D. Ill. 2014).

1 The present case involves no such routine or abusive
2 conduct. In this regard, it is more akin to In re Gilbraith, 523
3 B.R. 198, 208 (Bankr. D. Ariz. 2014), than to Daniels or Bauman.
4 In Gilbraith, the debtor had made minor mistakes which he then
5 corrected. The court referred to the lack of precedent for plan
6 disqualification based solely on the kinds of mistakes the debtor
7 had made and the IRS's "fairly forgiving" attitude toward them.
8 Id. at 209. "In any event, failure to timely file 5500 Reports
9 appears to, at most, be a matter of assessing civil penalties not
10 the outright disqualification of an offending plan." Id. at 205-
11 06. In the present case, the court accepts Mr. Eastman's and Mr.
12 Kahn's testimony and concludes that the debtor's documentation
13 and treatment of the loan repayments as hardship distributions,
14 although retroactive, will not result in disqualification of the
15 Plan.

16 The Debtor's Standard of Proof

17 The trustee cites Carter v. Anderson (In re Carter), 182
18 F.3d 1027 (9th Cir. 1999), for his proposition that the standard
19 of proof the debtor must satisfy is "unequivocal" evidence.
20 Discussing Fed. R. Bankr. P. 4003(c) and citing a bankruptcy
21 court decision from the Northern District of Illinois that had
22 used the term "unequivocal," the court stated that when the party
23 objecting to an exemption has produced evidence sufficient to
24 overcome the presumptive validity of an exemption claim, the
25 debtor must "come forward with unequivocal evidence to
26 demonstrate that the exemption is proper." Carter, 182 F.3d at
27 1029 n.3.

28 / / /

1 The Bankruptcy Appellate Panel in Kelley v. Locke (In re
2 Kelley), 300 B.R. 11 (9th Cir. BAP 2003), quoted this same
3 language from Carter and then held that the trustee's burden of
4 proof to overcome the presumptive validity of an exemption is
5 preponderance of the evidence. 300 B.R. at 17. The panel quoted
6 an earlier decision as holding that, "[i]n civil cases, the
7 objecting party need only provide proof sufficient to meet the
8 'preponderance of the evidence' standard, as opposed to the more
9 stringent 'clear and convincing evidence' standard." Id. at 16.
10 The panel cited United States ex rel. Farmers Home Admin. v.
11 Arnold & Baker Farms, 177 B.R. 648, 654 (9th Cir. BAP 1994),
12 which held that the debtor's standard of proof on plan
13 confirmation is preponderance of the evidence.

14 The panel in Arnold & Baker, in turn, noted that the U.S.
15 Supreme Court and the Tenth Circuit had held, respectively, that
16 the standard of proof for the creditor in non-dischargeability
17 and bar to discharge cases is preponderance of the evidence
18 (citing Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991), and In
19 re Serafini, 938 F.2d 1156, 1157 (1991)). The panel concluded
20 that "[a]llthough the holdings in Grogan and Serafini could
21 arguably be limited in its application to creditors, we find no
22 sufficient justification for imposing a heightened burden of
23 proof on the debtor in plan confirmation." Arnold & Baker, 177
24 B.R. at 655. This court finds no sufficient justification for
25 holding a debtor to an "unequivocal" evidence standard of proof
26 on an objection to exemptions when the standard for the trustee
27 is preponderance of the evidence, and there is no binding
28

1 authority for an "unequivocal" evidence standard.¹⁰

2 Finally, the court rejects the trustee's conclusion that the
3 debtor has "deliberately create[d] ambiguities with respect to
4 his retirement assets, in the hope that he will be able to remove
5 them from his account without anyone realizing what he has done,
6 and without paying taxes on the withdrawn funds." Initial Reply
7 at 12:9-12. The lynchpin of the argument is the debtor's amended
8 Schedule C, on which the Wells Fargo Bank and Scottrade accounts
9 were dropped from the list of assets appearing under the Plan
10 heading in the description column. On the original Schedule C,
11 the description of the Plan was:

12 ERISA Qualified Retirement Account managed
13 by Pension Services Inc. agent Ben Eastman,
14 CPA, account named the Pomeroy Retirement
15 Trust
16 The retirement account includes:
17 1. property titled to the account with an address
18 of 10646 Tudor Lane, Truckee, CA 96161 Lot
19 #4, valued at \$185,000.
20 2. Retirement acct held with Wells Fargo acct
21 ending ...5137 balance \$170,780.74
22 3. Retirement acct held with Scottrade acct
23 ending...5500 balance \$53,602.27

18 On the amended Schedule C, the Plan was described as:

19 ERISA Qualified Retirement
20 Account managed by Pension Services
21 Inc. agent Ben Eastman, CPA, account
22 named the Pomeroy Retirement Trust
23 The retirement account includes:
24 1. property titled to the account with an
25 address of 10646 Tudor Lane, Truckee,
26 CA 9616

25 10. The reference to unequivocal evidence in Carter was
26 dicta. "There was no real dispute in the bankruptcy court or the
27 BAP concerning these burdens in the abstract. Rather, the
28 parties disputed the relationship between a subchapter S
corporation and a shareholder/employee under C.C.P. § 706.011,
which was reflected in the disagreement about burdens of proof,
production, and persuasion." Carter, 182 F.3d at 1029 n.3.

1 In both schedules, the "Value of Claimed Exemption" and the
2 "Current Value of Property Without Deducting Exemption" were
3 listed as \$409,383.01. The court accepts the debtor's contention
4 that he intended his amended Schedule C as a claim of exemption
5 of all three assets, and rejects the following speculative
6 contention of the trustee:

7 The effect of [dropping the Wells Fargo account] was
8 arguably to acknowledge that the bank account had in
9 fact been distributed to him and was no longer part of
10 his retirement plan. Presumably he was hoping that no
11 one would require him to pay taxes on the distributed
12 property. Then, when the Trustee accepted the view
13 that the funds had been distributed to the Debtor, he
14 took the position that the Trustee should have realized
15 that he still intended to claim an exemption for the
16 funds, on the basis that they were retirement funds.
17 In other words, it was only when the problem was
18 identified that he asserted that the funds were still
19 retirement assets.


20 Initial Reply at 11:21-28. The trustee's interpretation does not
21 explain why the value of the claimed exemption and the value of
22 the asset without the exemption were both listed on the amended
23 Schedule C as \$409,383.01 or how either he or the IRS was likely
24 to be misled.

25 As support for his position that the debtor has exhibited a
26 nefarious pattern of conduct, the trustee also cites the
27 ambiguous nature of the Application, which the court found a bit
28 confusing but not nearly sufficient to prove the account is the
debtor's personal account, and complains about a loan the debtor
made from the Plan as carrying a usurious interest rate and as
providing income to the debtor he did not report on his tax
returns. The trustee has not supported this argument with
evidence or analysis.

28 / / /

1 For the reasons stated, the objection will be overruled.
2 The court will issue an order.

3 Dated: June 21, 2016

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ROBERT S. BARDWIL
United States Bankruptcy Judge

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**Instructions to Clerk of Court
Service List – Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the U.S. Mail.

Scott Charles Pomeroy
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John R. Roberts
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